No. 19-814

IN THE

Supreme Court of the United States

TONY DESHAWN MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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The Government litigated this case below on the theory that possession of any amount of marijuana, standing alone, creates a presumption that a person is armed and dangerous and can therefore be subjected to an intrusive *Terry* search. The Fourth Circuit based its decision solely on that theory, in conflict with the law of seven other courts.

The Government does not defend the Fourth Circuit's presumption here. Instead, it labors to justify the judgment below on alternative grounds, offering up a flurry of arguments not passed upon below. But it cannot so easily sidestep the clear split among the lower courts over the presumption the Government persuaded the Fourth Circuit to apply. This Court should follow its usual practice when confronted with such a situation: It should grant certiorari, resolve the conflict on the legal question squarely presented by the decision below (whether police can presume dangerousness whenever a person has a small amount of marijuana), and leave it to the lower courts to address the Government's alternative arguments on remand.

I. The Fourth Circuit applied a single-factor presumption, in clear conflict with other courts.

The Government cannot wish away the split described in the petition, Pet. 7-13. It is simply wrong to assert that the "Fourth Circuit has not adopted a 'per se' rule," BIO 16. Under the Fourth Circuit's "presumption," Pet. App. 4a, the presence of marijuana automatically creates an inference of dangerousness. Thus, the Fourth Circuit's rule is in

no sense the totality-of-the-circumstances test applied by other courts.

1. In the Fourth Circuit, the Government argued, quoting circuit precedent, that "*a single factor* satisfies the showing required to support a frisk: the 'officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops.'" U.S. C.A. Br. 13 (emphasis added) (quoting *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998)); *see also id.* 11, 15. The Fourth Circuit agreed with the Government and applied a guns-follow-marijuana presumption, identifying only one factor that suggested Mr. McCoy was dangerous: the presence of marijuana in his pants pocket. Pet. App. 4a. The court declared it "indisputable" that "a person carrying controlled substances is likely armed." Pet. App. 3a, 4a.

The Fourth Circuit's presumption cannot be equated to a totality-of-the-circumstances analysis. Presumptions operate by creating a "legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts." *Presumption*, *Black's Law Dictionary* (11th ed. 2019).

This mode of analysis is meaningfully different from a totality-of-the-circumstances inquiry. In the latter situation, any given inference "is weighed by focusing on the entire situation . . . and not on any one specific factor." *Totality-of-the-circumstances Test*, *Black's Law Dictionary* (11th ed. 2019). Recognizing that difference, this Court has granted certiorari to determine whether and how courts should apply legal presumptions in a variety of contexts. *See, e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188,

1194 (2018); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2466-67 (2014); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014); *Rita v. United States*, 551 U.S. 338, 346 (2007).

Actual experience confirms the difference between the two approaches. If the Fourth Circuit really were employing a totality-of-the-circumstances test, one would expect to see cases where the presence of a recreational amount of marijuana has not justified the inference that a suspect was armed and dangerous. *See* Pet. 8. But the Government does not identify a single case over the 22 years since *Sakyi* was decided where a court within the Fourth Circuit has found the presumption to be rebutted. By contrast, in just the handful of months since the Fourth Circuit's decision in this case, courts from jurisdictions that use a totality-of-the-circumstances test have rejected *Terry* searches that prosecutors tried to justify on the presence of drugs alone. *E.g., United States v. Devaugh*, 422 F. Supp. 3d 104, 116-17 (D.D.C. 2019); *Commonwealth v. Alton*, No. 1375 WDA 2018, 2020 WL 527917, at *3 (Pa. Super. Ct. Feb. 3, 2020).

2. Contrary to the Government's arguments, seven other courts have rejected the guns-follow-marijuana presumption. *See* Pet. 7-13.

For starters, the Government never disputes that the high courts of Nevada, Pennsylvania, Texas, and Utah reject the Fourth Circuit's guns-follow-marijuana presumption. *See* Pet. 9-10. Instead, the Government simply speculates about how some of those courts would apply their totality-of-the-circumstances test to the facts of Mr. McCoy's case.

See BIO 16-18. That speculation does not undermine the existence of the split.

The Government tries to minimize the D.C. Circuit's rejection of the guns-follow-marijuana presumption as a "passing caveat." BIO 15. Hardly. The D.C. Circuit reaffirmed its use of a totality-of-the-circumstances test in a case where the Government expressly argued for the Fourth Circuit rule. *See* Pet. 10-11 (discussing *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005)). And citing circuit precedent, a district court in that circuit recently "decline[d] to give the general 'gun-drug' nexus much weight" and suppressed the fruits of a *Terry* search. *Devaugh*, 422 F. Supp. 3d at 116.

Maryland's highest court cemented a particularly problematic split when it "decline[d] to follow the Fourth Circuit's lead" in creating a drugs-based presumption. *Norman v. State*, 156 A.3d 940, 966 (Md.), *cert. denied*, 138 S. Ct. 174 (2017); *see also* Pet. 9, 15-16. The Government argues that this split "does not suggest a conflict that would warrant this Court's intervention." BIO 18. Wrong. As the petition explained, this Court frequently grants certiorari to resolve conflicts over Fourth Amendment issues between a state's highest court and the federal circuit in which the state is located. Pet. 16. Police officers in Maryland are faced with conflicting decisions holding that a "nexus between guns and drugs does not advance the analysis of reasonable articulable suspicion where all that is known is that an odor of marijuana emanated from a vehicle," *Norman*, 156 A.3d at 970, and that the mere presence of marijuana is a green light to search.

The highest court in the District of Columbia also refuses to "impute a safety concern from the mere fact that the officers believed appellant was buying drugs." *Upshur v. United States*, 716 A.2d 981, 984 (D.C. 1998). The Government claims that that refusal somehow "reaffirmed that 'drugs and weapons go together.'" BIO 16 (quoting *Upshur*, 716 A.2d at 984, which was quoting *Griffin v. United States*, 618 A.2d 114, 124 (D.C. 1992)). Not in the way the Government suggests. The court made clear that that "connection" was insufficient, "without more," for police to assume a suspect is armed. *Griffin*, 618 A.2d at 124.

II. The Fourth Circuit's presumption is wrong.

1. The Fourth Circuit presumes that the presence of any amount of marijuana, per se, permits officers to perform a *Terry* search. That rule cannot be reconciled with this Court's repeated rejection of "efforts to impose a rigid structure" on the reasonable suspicion inquiry. *Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020).

The standard for reasonable suspicion "takes into account the totality of the circumstances—the whole picture." *Glover*, 140 S. Ct. at 1191 (quoting *Navarette v. California*, 572 U.S. 393, 397 (2014)). Thus, an "inflexible *per se* rule" based on a single factor cannot replace the totality-of-the-circumstances standard, which "must be determined on the particular facts and circumstances" of the case. *North Carolina v. Butler*, 441 U.S. 369, 375 (1979) (quotation marks omitted).

Accordingly, across a variety of cases, this Court has rejected purported shortcuts or categorical rules of thumb to judge reasonable suspicion. In *United*

States v. Sokolow, 490 U.S. 1 (1989), this Court rejected a rule that drew "a sharp line between types of evidence." *Id.* at 8. The Court explained that reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 7 (quotation marks omitted). So too in *Illinois v. Wardlow*, 528 U.S. 119 (2000), where this Court "wisely endorse[d] neither *per se* rule" offered by the parties. *Id.* at 126-27 (Stevens, J., concurring).

The Fourth Circuit's single-factor presumption contravenes this precedent. The Government apparently recognizes as much, given that it is not defending the rule it argued for below. *See* BIO 10.

2. The particular presumption here—that anyone who possesses any amount of marijuana is likely armed and dangerous—is also wrong as a matter of common sense. Today, thirty-three states have legalized medical marijuana and eleven states and the District of Columbia have legalized recreational marijuana. *See* Pet. 13-14. Still other states, including North Carolina, have transformed marijuana possession into a nonjailable citation offense. *Id.* 14, 22. In these jurisdictions, applying a guns-always-follow-marijuana rule is akin to assuming a man is armed because he is holding a beer in violation of an open container law.

3. The Fourth Circuit's presumption is particularly pernicious because it gives police the discretion, once they reasonably suspect even the most minor marijuana possession, to decide which individuals they will search. This broad discretion makes search decisions susceptible to an officer's bias based on a suspect's race and risks discriminatory enforcement. And as this case shows, even when a

Black driver takes every precaution possible to dispel the suggestion that he poses a threat, Pet. 3-4, the presumption permits police to subject him to an "intrusive, embarrassing police search," *id.* 23.

III. None of the Government's alternative arguments justifies denying review.

Instead of defending the Fourth Circuit's guns-follow-drugs presumption, the Government advances four alternative arguments in support of the judgment below. But none of those arguments justifies declining to grant review and resolve the question presented. The Government's alternative arguments are unpersuasive. But even more to the point, neither of the courts below considered any of them. At most, the arguments are fodder for remand. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1530-31 (2018).

1. The Government concocts the argument that the officers had reason to believe Mr. McCoy was armed and dangerous because he was engaged in drug distribution. BIO 6-11. But the Government made no such argument below. And the district court and the Fourth Circuit based their holdings on Mr. McCoy's *possession* of a small amount of marijuana; neither so much as mentioned suspected distribution. *See* Pet. App. 16a; Pet. App. 4a.

The Government never previously tried to make this case about distribution—and for good reason. To begin with, the arresting officer's own comments refute this distribution theory. Officer Skipper treated this as a commonplace possession case, remarking to Mr. McCoy about marijuana that "everybody's kinda got it these days." Pet. 21. Nor did the quantity suggest distribution: Mr. McCoy had

11.4 grams in his pocket. C.A. J.A. 92. That amount would constitute about a four-day supply for a single patient under typical medical marijuana dosage laws. *See, e.g.*, N.J. Stat. Ann. § 24:6I-10(f) (West 2019) (allowing about 2.8 grams per day).

With no argument based on quantity, the Government instead points to how the small quantity of marijuana was *packaged*, suggesting that marijuana is often packed into small baggies for distribution at "baggie corners." BIO 8-9. But if that's so, then consumers will also often purchase recreational quantities of marijuana in such packaging. That does not transform them into distributors. Supermarkets sell eggs in 12-count cartons, but we do not therefore assume that anybody driving home with a carton of eggs is selling them.

In a yet stranger turn, the Government attempts to build a drug distribution case on the distinction between the odors of fresh and burned marijuana. BIO 8. The record provides no support for this hypothesis: Officer Skipper did not cite it to explain his search, and also volunteered that "[s]ometimes it's hard to distinguish between the two [odors] actually," especially in small quantities. C.A. J.A. 54. And the Government does not spell out its olfactory argument, or cite any source explaining why odor might matter. BIO 8. Nor does any sensible explanation come to mind. All marijuana is fresh before it is used, so the Government's theory would make a distributor out of any purchaser who does not immediately consume his entire purchase.

Put another way, having abandoned the simple "marijuana = armed-and-dangerous" equation, the Government now tries to substitute a "fresh

marijuana = distribution = armed-and-dangerous" formulation. But introducing an extra step, if anything, strains the inference even further.

Moreover, the cases the Government cites (BIO 14) to establish a nexus between drug distribution and violence only serve to highlight the implausibility of its belated attempt to reframe *this* case. Those cases each involved "large quantities of cocaine." *United States v. Odom*, 13 F.3d 949, 959 (6th Cir.), *cert. denied*, 511 U.S. 1094, and 513 U.S. 836 (1994); *see United States v. Martinez*, 958 F.2d 217, 219 (8th Cir. 1992) ("$9,600 worth of cocaine"); *United States v. Dean*, 59 F.3d 1479, 1483 (5th Cir. 1995) ($5,000 of crack), *cert. denied*, 516 U.S. 1064, and 516 U.S. 1082 (1996). There is nothing remotely like that here, where only a small amount of marijuana is at issue.

2. Nor, contrary to the Government's suggestion, did the officer's criminal-history check contribute to a reasonable suspicion that Mr. McCoy was dangerous.

Only "what the officers knew before they conducted their search" is relevant to "[t]he reasonableness of official suspicion." *Florida v. J.L.*, 529 U.S. 266, 271 (2000). The Government's argument thus depends on its persistent insinuation that Officer Skipper knew that Mr. McCoy had prior felony convictions involving a weapon. BIO 8, 10, 15, 16, 17, 18. But the Government buries a critical admission in a footnote: The record actually "does not specify when Officer Skipper learned of the specific offenses in petitioner's criminal history." BIO 3 n.1. Thus, for all Officer Skipper knew at the time, Mr. McCoy had offered a beach bingo prize above $50 or had committed a third graffiti violation—each of

them felonies under North Carolina law. *See* N.C. Gen. Stat. § 14-309.14(1) (2019); N.C. Gen. Stat. § 14-127.1(c) (2015). Neither felony would suggest he had ever been armed—and the same is true of a host of other nonviolent felonies.

Moreover, one in twelve people—and a third of African American males—have a felony criminal record of some sort. *See* Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States 1948-2010*, 54 Demography 1795, 1807-08 (2017). This hardly supports an assumption that these tens of millions of people are forever armed and dangerous. Indeed, the Fourth Circuit has held that generally "a prior criminal record is not, standing alone, sufficient to create reasonable suspicion." *United States v. Powell*, 666 F.3d 180, 188 (2011) (quotation marks omitted) (history of armed robbery convictions).

3. The Government's attempt to reframe this case as a "search incident to arrest," BIO 19-20, also falls short. Again, neither court below relied on this theory.

And at any rate, the theory is wrong. The record is clear that Mr. McCoy was arrested because he had just been searched—not searched because he had just been arrested. During the stop, Officer Skipper himself told Mr. McCoy that he was "not under arrest; I usually write [only a citation] for marijuana." Pet. 4. And as this Court unanimously explained in *Knowles v. Iowa*, 525 U.S. 113 (1998), the rule allowing a search incident to arrest does not also allow a "search incident to *citation*." *Id.* at 118-19 (emphasis added).

The Government's reliance on *Rawlings v. Kentucky*, 448 U.S. 98 (1980), is unpersuasive. The arrest there was already being effectuated and was inevitable. The suspect had "claimed ownership" of "a jar" with "1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methyprylan, and pentobarbital." *Id.* at 100-01. In light of these different circumstances, this Court found the search to be incident to arrest even though "formal arrest" had not yet occurred. *Id.* at 111. Here, by contrast, Officer Skipper has already explained that he did not initiate an arrest until after the search revealed a gun. Pet. App. 4-5.

4. Finally, the good-faith exception to the exclusionary rule provides no justification for allowing the circuit split to fester while leaving in place a rule of substantive Fourth Amendment law that even the Government cannot bring itself to defend in this Court. The Court's opinion in *Davis v. United States*, 564 U.S. 229 (2011) (BIO 21), did not change the criteria for granting review. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), despite the Government's invocation of *Davis*,[1] this Court granted review of a Fourth Amendment question involving evidence from a search. And it did so even though the district court had identified the good-faith exception as an "additional basis" for denying petitioner's suppression motion, beyond finding no Fourth Amendment violation in the first place,

[1] *See* Br. in Opp. 31, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

United States v. Carpenter, 2013 WL 6385838, at *2 n.1 (E.D. Mich. Dec. 6, 2013). Ultimately, after deciding the Fourth Amendment question, the Court remanded the case for further proceedings. *Carpenter*, 138 S. Ct. at 2223.

It should do the same here. Because the courts below erroneously failed to find a Fourth Amendment violation in the first place, neither has addressed whether the good-faith exception might apply. And given the current state of the record, the district court may well need to take additional testimony or make additional findings before deciding the good-faith question.

* * *

In short, the Government may have various arguments it wishes to press on remand. But before any remand, this Court should grant certiorari and confirm what the Government all but admits: The Fourth Amendment does not allow officers to presume that someone is armed and dangerous merely because he possesses a small amount of marijuana.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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